

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

77-2073

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 77-2073

IOLA FORTS, et al.,

Appellees,

v.

BENJAMIN WARD, et al.,

Appellants.

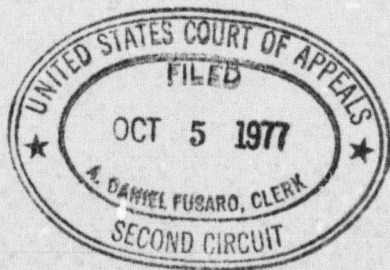
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF
AMICUS CURIAE OF AMERICAN CIVIL LIBERTIES
UNION

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IN THE SECOND CIRCUIT COURT OF APPEALS

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Appellants. :
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Motion of American Civil Liberties Union for
Leave to file Brief Amicus Curiae

Amicus respectfully moves, pursuant to Rule 29, Fed.
R. App. P., for leave to file the accompanying brief. ^{*/} Counsel
for the appellants have consented to the filing of the brief;
counsel for the appellees will take no position regarding its
filing.

*/ Although amicus urges reversal of the district court
order, the overarching argument this brief presents
supports the appellees' contention (apparently not
challenged by appellants) that their constitutional
right to privacy must be protected. Therefore, this
brief is filed within the time allowed for the appellees'
brief. If the Court determines that this brief, although
it essays a genuine "friend of the court" position,
should have been filed within the time allowed the
appellants, amicus respectfully moves for leave to file
out of time.

The American Civil Liberties Union is a nationwide, non-partisan organization of over a quarter of a million members dedicated to defending the rights of all persons to equal treatment under the law. Recognizing that the confinement of men's or women's opportunities on account of sex is a pervasive problem at all levels of society, the American Civil Liberties Union Foundation has established a Project to work toward the elimination of gender-based discrimination.

Lawyers associated with the American Civil Liberties Union have participated in a number of cases challenging sex-based discrimination. We presented the appeal in Reed v. Reed, 404 U.S. 71 (1971), participated as counsel for the appellants and later as amicus curiae in Frontiero v. Richardson, 411 U.S. 677 (1973), represented the appellant in Kahn v. Shevin, 416 U.S. 351 (1974), the appellees in Edwards v. Healy, 241 U.S. 772 (1975), Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 97 S. Ct. 1021 (1977), and the petitioners in Struck v. Secretary of Defense, cert. granted, 409 U.S. 947, judgment vacated, 409 U.S. 1071 (1972), and Turner v. Department of Employment Security, 423 U.S. 44 (1975), and acted as counsel for petitioners, appellants, and appellees, and as amicus curiae in the Supreme Court in several other sex equality and women's rights cases.

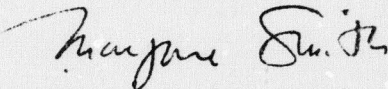
The American Civil Liberties Union has also established a Project to work for the protection of the constitutional rights of inmates in prisons and other correctional institutions. Pending cases which seek to redress deprivation of prisoners' privacy rights include Abbott v. Richardson, Civ. Action No. 1047-73 (D.D.C. pending), and Lyles v. Ward, Civ. Action No. 76-4786 (S.D.N.Y. pending).

The American Civil Liberties Union believes that this case, concerning accomodation of two important values -- the privacy rights of inmates at a state prison and the employment rights of correction officers under Title VII of the Civil Rights Act of 1964 --, presents a sensitive issue significant to achievement of equal rights, responsibilities, and opportunities for men and women under the law. Because of our experience in both sex discrimination litigation and privacy litigation, we believe our perspective is distinct and has special bearing on this controversy.

This brief argues that the district court's preliminary injunction gave insufficient weight to nondiscrimination requirements of Title VII of the 1964 Civil Rights Act. In flatly prohibiting the assignment of opposite-sex guards to the living units of a prison, the court's injunction may have swept more broadly than is necessary to protect the

inmates' legitimate privacy interests.

Respectfully submitted,



Dated: September 30, 1977

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IN THE
SECOND CIRCUIT COURT OF APPEALS OF THE UNITED STATES

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IOLA FORTS, et al., :
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 APPELLEES, :
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 V. :
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 APPELLANTS. :
:
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BRIEF OF AMERICAN CIVIL LIBERTIES UNION

AMICUS CURIAE

Interest of Amicus

The interest of amicus appears in the foregoing motion.

STATEMENT OF FACTS

Plaintiffs are women inmates of the Bedford Hills Correctional Facility, the only institution in the State of New York which houses adult women serving sentences for felony convictions. In February 1977, male correction officers were assigned by defendants to housing units at the Bedford

Hills Correctional Facility.^{1/}

In April 1977, plaintiffs commenced this action alleging deprivation of the right to privacy through the posting of male correction officers at various places in the prison, including housing units, shower facilities and the prison clinic, in such manner as to cause the women to be involuntarily exposed to correction officers.

OPINION OF THE DISTRICT COURT

By memorandum dated June 17, 1977, the court granted plaintiffs a preliminary injunction prohibiting defendants from assigning male guards to the housing units and hospital unit of Bedford Hills Correctional Facility.

ARGUMENT

THE DISTRICT COURT'S DECISION, WHILE PROPERLY CONCERNED WITH THE PRIVACY RIGHTS OF THE PLAINTIFF INMATES, FAILED TO GIVE SUFFICIENT CONSIDERATION TO THE IMPACT OF TITLE VII UPON THIS CASE.

^{1/} Pursuant to a policy adopted by defendants, male and female guards were assigned to New York prisons without regard to whether the prison housed male or female inmates.

Amicus agrees with appellees and the district court^{2/} that plaintiff inmates have a constitutional right to privacy.^{3/} However, it is far from clear that the privacy right may be protected by totally excluding male guards from the housing and hospital units of the Bedford Hills Correctional Facility.

^{2/} Appellants apparently do not dispute the existence of the right to privacy for prison inmates. See Brief of Union Defendants and Brief for Defendants-Appellants Ward, Clement and Reid.

^{3/} The scope of this constitutional right does not depend upon the sex of an inmate. While tradition may have dictated greater modesty in women than in men, historic notions of the proper behavior of the two sexes, and the "traditional way of thinking about females," no longer justify law-sanctioned, gender-based differentials. Califano v. Goldfarb, ___ U.S. ___, 97 S. Ct. 1021, 1035 (1977) (Stevens, J., concurring opinion). Time and again, the Supreme Court has emphasized that official pigeon-holing by sex reinforces the role-typing that effectively places women "not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973); see Taylor v. Louisiana, 419 U.S. 522 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Stanton v. Stanton 421 U.S. 7 (1975); Craig v. Boren, 429 U.S. 190 (1976); Califano v. Goldfarb, ___ U.S. ___, 97 S. Ct. 1021 (1977). As Judge Frankel noted in an opinion handed down earlier this month:

The value placed upon privacy, as against unwanted intrusions by members of the opposite sex, remains high. But the particular concern for female inviolability, and the corresponding neglect of comparable male interests, is already somewhat anachronistic.

United States ex. rel. Wolfson v. Levi, 75 Civ. 6000 (Sept. 15, 1977 S.D.N.Y.), Slip Op. at 109-110.

The district court apparently gave only passing consideration to Title VII of the Civil Rights Act of 1964. The court said:

Male correction officers were assigned to the housing and hospital units at Bedford Hills in response to a conception by the prison administration and the union of the requirements of Title VII. The strictures of Title VII, however, do not mandate providing opportunity to possible "Peeping Toms".

Slip. Op. at 7. While Title VII surely does not mean that "Peeping Toms" may be turned loose in a female prison, ^{4/} Title VII does represent national policy that employment discrimination on the basis of sex is invidious and must be eradicated. ^{5/}

^{4/} See page 7 infra.

^{5/} Congress declared in connection with the passage of the 1972 amendments to Title VII:

In recent years, the courts have done much to create a body of law clearly disapproving of sex discrimination in employment. Despite the efforts of the courts and the [EEOC] Commission, discrimination continues to be widespread, and is regarded by many as either morally or physiologically justifiable.

This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 4-5 (1971).
See also S. Rep. No. 92-415, 92d Cong., 1st Sess. 7-8 (1971).

Section 703(a)(1) and (2) of Title VII prohibit employers from hiring, employing, limiting, segregating or classifying employees on the basis of sex. The only defense to an employer's resort to a sex criterion that "in any way... deprive[s] or tend[s] to deprive any individual of employment opportunities" is contained in Section 703(e):

Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees on the basis of sex...in those certain instances where...sex... is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business.

The scope of the bona fide occupational qualification (bfoq) was recently discussed by the Supreme Court in Dothard v. Rawlinson, ___ U.S. ___, 45 U.S.L.W. 4888 (U.S. June 27, 1977). That discussion is especially instructive here because the employment practices at issue in Dothard also involved prison guards. In Dothard, the Court cited with approval the Equal Employment Opportunity Commission's interpretation of the scope of the bfoq, ^{6/}and stated unambiguously:

^{6/} The EEOC's Guidelines on Discrimination Because of Sex provide that the following do not constitute a bfoq:

- (ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and

We are persuaded -- by the restrictive language of §703e, the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission -- that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.

Id. at 4891.

Nevertheless, the Dothard Court held that because the conditions in Alabama's male maximum security prisons were aberrant -- "characterized by rampant violence" and a "jungle atmosphere" -- women guards could, consistent with Title VII, be excluded. The Court said:

The likelihood that inmates [20% of them sex offenders scattered throughout dormitory facilities] would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel. The employees' very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility.

Id. at 4892.

However, the Court pointed to evidence of the feasibility of opposite-sex guards in contact positions in most

(F.N. continued from preceding page.)

not on the basis of any characteristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers....

30 Fed. Reg. 14927 (Dec. 2, 1965); 29 C.F.R. §1604.2.

prisons, including maximum-security institutions:

Alabama's penitentiaries are evidently not typical. The appellee's two experts testified that in a normal, relatively stable maximum security prison -- characterized by control over the inmates, reasonable living conditions, and the segregation of dangerous offenders -- women guards could be used effectively and beneficially.

Id. at n. 23.

While the majority in Dothard did not address the privacy issue, Justice Marshall's approach to the danger factor in Alabama's male maximum security prisons led him to reach that question. He pointed out:

...[I]t may well be possible, once constitutionally adequate staff is available, to rearrange work assignments so that legitimate inmate privacy concerns are respected without denying jobs to women. Finally, if women guards behave in a professional manner at all times, they will engender reciprocal respect from inmates, who will recognize that their privacy is being invaded no more than if a woman doctor examines them. The suggestion implicit in the privacy argument that such behavior is unlikely on either side is an insult to the professionalism of guards and the dignity of inmates.

Id. at 4894 n. 5 (concurring in part and dissenting in part).

Apart from the privacy interests involved in this case, sex is plainly not a bfoq for the job of prison guard at Bedford Hills. Nothing about maleness itself precludes successful performance of the job by males. However, Title VII must be interpreted to take into account the constitutional rights of affected parties. McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972). The inmate's constitutional right to privacy may thus impel appraisal of sex as a bfoq for a prison

guard job. But to harmonize the two concerns -- inmate privacy, and equal employment opportunity -- the bfoq exception must be applied with a fine chisel, not a blunt tool.

In the instant case, legitimate privacy concerns plainly warrant a restriction upon guards peering at female inmates engaged in bathing or defecating. But it by no means follows that violations of privacy will occur unless male guards are barred at all times from all areas of living units and the hospital unit. The preliminary injunction, insofar as it totally bans male guards from the entire hospital area and all living units, may unnecessarily exclude male guards from activities within these units which do not sufficiently involve privacy concerns.

In a case challenging the Federal Bureau of Prisons policy of assigning male and female correction officers at the Metropolitan Correctional Center without regard to sex, Judge Frankel, only two weeks ago, declined to find that the privacy interest of an inmate requires total exclusion of opposite-sex guards from prison living units. Relying in part upon Dothard, Judge Frankel demonstrated an appreciation of the sensitivity and difficulty of this issue. He resolved the challenge in a manner fully reflective of the position of

amicus in the case at bar:

The subject lies...in a sector of the community's mores where the state of flux is uniquely notable.... In the last analysis... the overriding facts may well be the phenomena of uncertainty and change. And these counsel a tentative and gingerly approach by the judges. The community's standards are obviously prime concerns in deciding how to regulate contacts, relationships, and exercises of authority between people of opposite sexes..

Moreover, since rules and standards in this area affect selection and assignment of correctional employees, prescriptions in terms of sex confronts powerful policies opposed to discriminations in employment based upon sex. Civil Rights Act of 1964, Title VII, 42 U.S.C.A. §2000e et seq.; Dothard v. Rawlinson, ___ U.S. ___ (1977). We approach, then, in a setting of fluid and sometimes conflicting values, petitioners' contention that correctional officers should be people of the same sex as the inmates in the unit.

Upon the evidence in this case, and upon the pertinent grounds of judgment and the judicial limitations suggested above, the court deems this a matter for minimal relief. Whatever different views may evolve as matters of social and legislative policy, there are no sufficient grounds for the broad commands petitioners seek. The court will not order the segregation of correctional personnel to match the sexes of the inmates. Neither the evidence nor general facts that might be judicially noticed warrant an order so drastic and confining. See Dothard v. Rawlinson, *supra*, at ___ n. 23; Sex Segregation of American Prisons, 82 Yale L.J. 1229, 1241 (1973).

On the other hand, respondents must ensure more effectively than they have that the elemental requirements of inmates' dignity and privacy are observed. Suitable regulations (and the court's decree) must forbid entry into rooms or bathroom facilities by officers of the opposite sex

unless (a) there has been sufficient warning or (b) emergent necessity justifies an exception. Suitable discipline - preferably by respondent, but by the court if necessary - will attend violations of these rules.

While the court should and will order no more at this time, the question must be deemed an open one as facts and attitudes continue to shift over time. If today's very limited directions prove insufficient to assure simple decency, a closer approach to petitioners' view may come to be required. On this, as on other topics, however, it is to be hoped that flexible adaptations by the people with day-to-day power and responsibility will limit or obviate further interventions by the court.

United States ex. rel. Wolfson v. Levi, 75 Civ. 6000 (Sept. 15, 1977, S.D.N.Y.) Slip. Op. at 108-113.

In contrast to Judge Frankel's thoughtful and balanced approach to harmonization of the interests at stake, the two decisions relied upon by the court below fail to discuss seriously the importance of Title VII to the issue of excluding employment of opposite-sex guards. ^{1/}

Title VII is more than a judicial "divertissement"

^{1/} See In re Long, 127 Cal. Rptr. 737 (Cal. App. 1976) and Reynolds v. Wise, 375 F. Supp. 145 (N.D. Tex. 1973). Furthermore, Long and Reynolds can be distinguished factually from the instant case in that the living units in those cases were dormitories, where activities of each inmate could be observed by all guards no matter where they were positioned. Such physical conditions do not exist at Bedford Hills, where inmates are provided with separate living quarters.

(see note 3, supra) and requires more than passing reference when a court bars all individuals of one sex from certain positions. Upon fuller consideration, the district court may find that an injunction less restrictive than the one preliminarily ordered is not feasible. On the other hand, it may be that the privacy interest can be accommodated through means less restrictive than the rigid order now in force. But only full assessment of the case, informed by all relevant federal policies, will insure a proper resolution.

CONCLUSION

The injunction of the district court, though it properly recognizes the privacy right of prison inmates, fails to manifest sensitive consideration of the relevance of Title VII, and thus may sweep more broadly than is necessary to protect that right. This Court should remand to the district court with instructions that it consider more fully the possibility of a balanced, flexible decree that

would accommodate the interests of inmate privacy and equal employment opportunity.

Respectfully submitted,

Monroe H. Freedman

Dated: September 30, 1977

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* Attorneys for amicus gratefully acknowledge the assistance provided in the preparation of this brief by Timothy Willert, student at Columbia Law School.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK]
 : ss.
COUNTY OF NEW YORK]

I, John Pettey, say:

I am the secretary to Marjorie Mazen Smith,
Attorney at Law and an attorney for plaintiffs in this action.

Upon her instructions, on the 30th day of September
19 77, I served the within Motion for Leave to File Brief
and Brief Amicus Curiae of American Civil Liberties Union
on the Attorney for appellees & appellants in this action,
by placing a true copy thereof enclosed in a sealed envelope
with postage thereon fully prepaid, in the United States mail
at New York, New York addressed as follows:

Steven Latimer
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579 Courtlandt Ave.
Bronx, N.Y. 10451

Louis J. Lefkowitz
Attorney General
of the state of New York
Two World Trade Center
New York, New York

I CERTIFY UNDER PENALTY OF PERJURY THAT THE FORE-
GOING IS TRUE AND CORRECT.

Executed this 30th day of September, 19 77,
at New York, New York.

John Pettcy

SUBSCRIBED AND SWORN TO BEFORE
ME this 30th day of September,
19 77

Marjorie Smith
Notary Public, County of New York,
State of New York

MARJORIE SMITH
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-4515701
Qualified in New York County
Commission Expires March 30, 1978